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IN THE

Supreme Court of the United States

OCTOBER TERM, 1903

THE HELENA WATER WORKS COMPANY,
Appellant.

versus

THE CITY OF HELENA,
Appellee.

BRIEF OF APPELLANT ON MOTION TO DISMISS OR AFFIRM.

STATEMENT OF THE CASE.

This suit was instituted in the circuit court of the United States, ninth circuit, district of Montana, by The Helent Water Works Company, a New Jersey corporation, against the City of Helena, a municipal corporation of Montana, for the purpose of obtaining an injunction restraining the said city from acquiring a water system and supply and engaging in the business of furnishing water to itself and its inhabitants in competition with appellant.

In the month of January, 1890, the city council of said City of Helena adopted, and the mayor of said city approved, Ordinance No. 248 entitled, "To provide the City of Helena and its inhabitants with a permanent water sup-

ply." A copy of this ordinance is made part of the bill as Exhibit A. (Record, pages 9 to 18). By this ordinance a franchise to construct, maintain and operate a water system in the City of Helena for the purpose of supplying said city and its inhabitants with water, for the term of twenty years was granted to the Helena Consolidated Water Company, its successors and assigns. The ordinance was accepted, and the requirements of Sec. 25 thereof with reference to furnishing a bond and a certain relinquishment were complied with. The Helena Consolidated Water Company expended several hundred thousand dollars in providing a water supply and system. The appellant is the successor of the Helena Consolidated Water Company, and has been, since the month of April, 1899, the owner and in possession of said system and supply, and engaged in furnishing water to the said city and its inhabitants. There is no question but that the appellant and its grantors and predecessors in interest have complied with said ordinance, and the same is in full force and effect. (Record p. 49).

Sec. 26 of said ordinance reads as follows:

"It is hereby declared and understood to be of the essence of the agreement and the acceptance hereof that the said Helena Consolidated Water Company shall, at all times during the term of such agreement, provide all the inhabitants of the city, whatever their number may be, with a full, ample and sufficient supply of good, pure and wholesome and clear water, and shall convey, distribute and sell the same to them upon the terms and conditions herein provided and expressed." (Record p. 18).

In the month of December, 1899, the city council of the City of Helena adopted, and the mayor of said city approved, Ordinance No. 467, entitled: "An ordinance relating to the procurement of a water system and supply for the City of Helena, which shall own and control said sys-

tem and supply and devote the revenue derived therefrom to the payment of the debt incurred therefor, and providing for the submission to the taxpayers affected thereby of the question of extending the limit of indebtedness of said city over and above the three per cent. limit provided by Section 6 of Article XIII of the Constitution of the State of Montana, for the purpose of procuring such water system and supply." This ordinance is made Exhibit B to the bill, and is found in the record on pages 18 to 20. Pursuant to the provisions of this ordinance a notice of election was given, and the election was held on the 18th day of January, 1909, at which a majority of the voters voted in favor of the proposition to extend the limit of indebtedness for the purpose mentioned. In December, 1900, the city council adopted, and the mayor approved, Ordinance No. 483, entitled: "Amending Ordinance No. 482, authorizing the taking of all of the water and water rights of McClellan Creek, and those water rights of Prickly Pear Creek comprising the waters of said McClellan Creek, for the purpose of procuring a water supply for the City of Helena, Montana, which shall own and control the same, and authorizing the commencement of condemnation proceedings for such purpose." This ordinance is made a part of the bill as Exhibit C, and is contained in the record on pages 20 and 21. The city council also, in the month of April, 1901, adopted a preamble and resolution authorizing the purchase of certain water rights for the consideration of $30,000. This preamble and resolution is made a part of the bill as Exhibit D. (Record p. 22).

Par. 27 of the bill reads as follows:

"And your orator further shows and alleges that the said ordinances numbered respectively 467 and 483, and the preamble and resolution adopted and approved as aforesaid, impair the obligation of the contract between

your orator and said city resulting from the passage, approval and acceptance of said Ordinance No. 248, in violation of Section 11, Article III, of the constitution of the State of Montana, and Section 10, Article I, of the constitution of the United States." (Record p. 7).

Par. 29 of the bill is as follows:

"And your orator further shows that if the said defendant, the City of Helena, is not enjoined and restrained from carrying out its design and purpose of acquiring a water plant and system and supply, and from engaging in furnishing the said city and its inhabitants with water, it will, as your orator is informed, verily believes and alleges, acquire such plant, system and supply and engage in said business, thereby taking the property of your orator, consisting of the franchise granted by said ordinance No. 248, the rights and privileges conferred thereby, the contract contained therein, and the water plant, system and supply of your orator, without due process of law, and in violation of the fourteenth amendment to the constitution of the United States." (Record p. 7).

The indebtedness of the City of Helena is now and has been for several years in excess of the three per cent limit prescribed in Sec. 6 of Art. XIII of the constitution of Montana, which provides as follows:

"No city, town, township or school district shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding three per centum of the value of the taxable property therein, to be ascertained by the last assessment for the state and county taxes previous to the incurring of such indebtedness, and all bonds or obligations in excess of such amount given by or on behalf of such city, town, township or school district shall be void; *Provided, however*, that the legislative assembly may extend the limit mentioned in this section, by authorizing municipal corporations to submit the question to a vote of the taxpayers affected thereby, when such increase is necessary to construct a sewerage system or to procure a supply of water for such municipality which shall own and control said

water supply and devote the revenues derived therefrom to the payment of the debt."

Subd. 64 of Sec. 4800 of the Political Code of Montana, as amended by an act approved March 8, 1897, (Session Laws of 1897, p. 203), provides in part as follows:

"The city or town council has power:

"64. To contract an indebtedness on behalf of a city or town, upon the credit thereof, by borrowing money or issuing bonds for the following purposes, to-wit: erection of public buildings, construction of sewers, bridges, waterworks, lighting plants, supplying the city or town with water by contract, the purchase of fire apparatus, the construction or purchase of canals or ditches and water rights for supplying the city or town with water, and the funding of outstanding warrants and maturing bonds; provided, that the total amount of indebtedness authorized to be contracted in any form, including the then existing indebtedness, must not, at any time, exceed three per centum of the total assessed valuation of the taxable property of the city or town, as ascertained by the last assessment for State and County taxes; provided, that no money must be borrowed on bonds issued for the construction, purchasing or securing of a water plant, water system, water supply, or sewerage system, until the proposition has been submitted to the vote of the taxpayers affected thereby of the city or town and the majority vote cast in favor thereof; and, further provided, that an additional indebtedness shall be incurred, when necessary, to construct a sewerage system or procure a water supply for the said city or town which shall own or control said water supply and devote the revenue derived therefrom to the payment of the debt: The additional indebtedness authorized, including all indebtedness heretofore contracted, which is unpaid or outstanding, for the construction of a sewerage system, shall not exceed ten per centum over and above the three per cent. heretofore referred to, of the total assessed valuation of the taxable property of the city or town as ascertained by the last assessment for State and County taxes; and, provided further, that the above limit of three per centum shall not be

extended, unless the question shall have been submitted to a vote of the tax-payers affected thereby and carried in the affirmative by a vote of the majority of said tax-payers who vote at such election. It is further provided, that whenever a franchise has been granted to, or a contract made with, any person or persons, corporation or corporations, and such person or persons, corporation or corporations, in pursuance thereof, or otherwise, have established or maintained a system of water supply or have valuable water rights or a supply of water, desired by the city or town for supplying the said city or town with water, the city or town granting such franchise, or entering in such contract, or desiring such water supply, shall, by the passage of an ordinance, give notice to such person or persons, corporation or corporations, that it desires to purchase the plant and franchise and water supply of such person or persons, corporation or corporations, it shall have the right to so purchase the said plant or water supply upon such terms as the parties agree; in case they cannot agree, then the said city or town shall proceed to acquire the same under the laws relating to the taking of private property for public use; and any city or town acquiring property under the laws relating to the taking of private property for public use shall make payment to the owner or owners of the plant or water supply of the value thereof legally determined, within six months from and after final judgment is entered in the condemnation proceedings. For the purpose of providing the city or town with an adequate water supply for municipal and domestic purposes, the city or town council shall procure and appropriate water rights and title to the same and the necessary real and personal property to make said rights and supply available, by purchase, appropriation, location, condemnation or otherwise."

The city of Helena was created by a special act of the Territorial Legislature in 1881. The charter of the city conferred the following powers, among others, upon the city council: (a) "To make regulations to secure the general health of the inhabitants;" (b) "To provide the city with water, erect hydrants and pumps, build cisterns

and dig wells in the streets for the supply of engines and buckets;" (c) "To provide for the prevention and extinguishment of fires." (See charter of city approved Feb. 22, 1881; Laws of 12th Territorial Legislature, p. 112.)

The city became subject to the general municipal corporation act of the state in 1895. This act, as amended by an act approved March 8, 1897, conferred power upon the city council "To adopt, enter into, and carry out means for securing a supply of water for the use of a city or town, or its inhabitants." (See Session Laws of 1897, p. 212.)

It is alleged in the bill of complaint that the appellant and its predecessors and grantors have fully complied with ordinance No. 248. In the agreed statement of facts it is stipulated that these allegations of the bill are true, (Record p. 44) and that said ordinance is in full force and effect. (Record, p. 49.)

In addition to the claim that the ordinances and preamble complained of have the effect of impairing the obligation of the contract contained in ordinance No. 248, appellant further maintains:

1. That the said city is not authorized to incur an indebtedness for a water supply and system for the reason that the limit of its indebtedness can only be extended, as provided in Sec. 6 of Art. XIII of the constitution of Montana, by a special statute, and the general statute—subd. 64 of Sec. 4800 of the Political Code, as amended—is unauthorized and unconstitutional.

2. That the City of Helena, having granted a franchise to the Helena Consolidated Water Company, its successors and assigns, and entered into the contract evidenced by ordinance No. 248, pursuant to which the water works of appellant were established and have been maintained, the said city is precluded by the provisions of subd. 64 of sec. 4800 of the Political Code, as amended, from acquiring any

plant or supply except that now being operated by appellant.

3. That the city, having provided a "full, ample, and sufficient" supply of water for its inhabitants by contract, is without power to supply the inhabitants with water, for the reason that the only purpose which it could have by so doing would be to make a profit therefrom. The city is not authorized to engage in a business of a private nature for the sole object of gain,—at least in the absence of an express delegation of power to do so.

The appellant asserts a right to the relief demanded in the bill in the dual capacity of a taxpayer and as the successor of the Helena Consolidated Water Company to the franchise granted by, and contract contained in, ordinance 248.

The case was heard in the circuit court upon an agreed statement of facts. (Record, pages 44 to 49 inclusive.)

The circuit court rendered a decree enjoining the city "from acquiring a water plant, system or supply (other than the plant, system and supply of complainant) to be owned or controlled by it, for the purpose of supplying its inhabitants, or any thereof, with water, and from furnishing or supplying said inhabitants, or any thereof, with water until after the expiration of the franchise granted to the Helena Consolidated Water Company, its successors and assigns, by Ordinance No. 248 of the ordinances of said city, to-wit, January 15th, 1910." (Record, p. 129). Counsel for the city excepted to the decree upon the ground that the same should not restrain the city from acquiring a system and supply for furnishing water to its inhabitants, but should be limited to restraining the city from supplying water to the inhabitants during the life of the franchise. (Record, p. 130). An appeal was taken from this decree to the circuit court of appeals, where the same was re-

versed. The water company thereupon appealed to this court.

The jurisdiction of the circuit court was based upon the claim of a Federal question, and also upon the ground of diversity of citizenship of the parties.

A brief has been filed on the merits of the case in which the Federal question and the other questions presented are fully discussed.

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If a Federal question is presented by the statement of complainant's case in the bill, as there exists a diversity of citizenship the jurisdiction of this court to entertain the appeal herein cannot be questioned.

American Sugar Ref. Co. v. New Orleans, 181 U. S. 277.

Nor. P. R. Co. v. Soderberg, 188 U. S. 526.

Is a Federal question presented? We submit in behalf of the appellant that by the passage and approval of ordinance No. 248 and the acceptance thereof a contract resulted by which appellee agreed that it would not engage in the business of supplying water to its inhabitants in competition with appellant during the period of twenty years, the term of such contract. We do not claim that there is any express provision of the contract to this effect, and neither do we claim, as contended by the appellee in the case of Joplin v. Southwest Missouri Light Co., 24 Sup. Ct. Rep. 43, that the city is precluded from becoming a competitor of appellant in the business of furnishing water to the inhabitants by virtue of the grant of the franchise contained in ordinance No. 248. Our contention is that by the acceptance of Ordinance No. 248 a contract was

entered into by which it was agreed that the Helena Consolidated Water Company, its successors and assigns, should, during the life of the franchise, provide and furnish all of the inhabitants of the city, whatever their number might be, with a sufficient supply of water, and convey and sell the same to them upon the terms and conditions expressed in the ordinance. (Ordinance No. 248, Sec. 2; Record, p. 18) and that by virtue of this agreement there is an implied contract or agreement on the part of the city that it will not interfere with or prevent the appellant from performing this obligation, by itself engaging in the commercial business of furnishing the inhabitants with water. In other words, we submit that by virtue of the contractual obligation on the part of appellant to furnish all of the inhabitants with water during the life of said franchise, there exists a correlative obligation on the part of said city to refrain from doing what it has contracted appellant shall do.

It is argued by counsel for the city that the contention thus made by appellant cannot be maintained, for the reason that the city was prohibited from granting an exclusive franchise, and, also, because the ordinance expressly provides that the franchise granted is not exclusive. We do not claim that the franchise granted is exclusive. What we say is that the city entered into a contract by which it ceased become a competitor of appellant in the business of supplying the inhabitants with water. Such a contract does not make the franchise exclusive. This was expressly held and decided in the case of Walla Walla v. Walla Walla Water Co., 172 U. S. 1.

Counsel for the city also argue that the city reserved the right to install a water system of its own and furnish water to its inhabitants, by virtue of the provisions of Sec. 3 of the ordinance. This claim involves a construction of

the ordinance and a consideration of the case on its merits and consequently it cannot be determined on a motion to dismiss or affirm. The section of the ordinance referred to has reference to the control by the city over the streets, a fair construction of the language "sewer works or other works or plants of a public nature" and herein in connection with the other provisions of the ordinance, excludes the idea of water works. Again, the right of the city to occupy the streets is entirely distinct and different from the right to engage in the commercial business of furnishing water to private consumers. It may have contracted away its privilege to sell water to the citizens and still have the right to occupy the streets with pipes and mains.

The question as to whether there is an implied contract, as contended by appellant, is fully discussed in the brief on the merits on pages 10 to 19 inclusive.

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In the case of St. Paul Gas Light Co. v. St. Paul, 181 U. S. 142, this court said: "Where ordinances are made legislative in character by the organic law of the State, and are passed in the exercise of a conferred power, the power to incorporate provisions into such legislation imposing also on the city the duty, when necessary, to provide the funds to pay a contract made by it. * * * In case of this nature, therefore, the question to be considered are these: Was there a contract, and if so, what obligations arose from it? And, have these been since legislation impairing the contract obligations?"

See also Wilmington v. Reynolds, 203 U. S. 555.

Ordinance No 248, having been accepted and acted upon, constitutes a contract.

Walla Walla v. Walla Walla Water Co., 172 U. S. 1; Vicksburg Water Co. v. Vicksburg, 185 U. S. 70.

That the ordinance and resolution, which it is asserted

impair the obligation of the contract with appellant, are laws of the State within the meaning of the term "law" as used in Sec. 10 of Art. I of the Constitution of the United States, is firmly established by the decisions of this court.

Walla Walla v. Walla Walla Water Co., 172 U. S. 1.
St. Paul Gas Light Co. v. St. Paul, 181 U. S. 142.
Penn Mut. L. Ins. Co. v. Austin, 168 U. S. 685.
Davis & Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207.

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When it appears that the Federal question is presented in good faith and is not frivolous, the motion to dismiss will be denied.

Illinois Cent. R. Co. v. Chicago, 176 U. S. 658.
Penn Mutual L. Ins. Co. v. Austin, 168 U. S. 685.

In the case of Illinois Cent. R. Co. v. City of Chicago, supra, the court said: "Without determining the effect of such ordinance, the question of whether it impairs the charter of the company, giving to that charter a broad construction, is fairly open to discussion. (Authorities cited). The claim is certainly not a fraudulent one. In determining the existence of a Federal question it is only necessary to show that it is set up in good faith and is not wholly destitute of merit."

In the case of Penn Mutual Life Insurance Co. v. Austin, supra, this court said: "But the words of the statute which empower this court to review directly the action of the circuit court are that such power shall exist wherever it is claimed on the record that a law of a state is in contravention of the Federal Constitution. Of course, the claim must be real and colorable, not fictitious and fraudulent. The contention here made, however, is, not that the bill, without color of right, alleges that the state law and city ordinances violate the Constitution of the United States, but that such claim as alleged in the bill is legally

unsound. The argument then, in effect, is that the right to a direct appeal to this court does not exist where it is claimed that a state law violates the Constitution of the United States, unless the claim be well founded. But it cannot be decided whether the claim is meritorious and should be maintained without taking jurisdiction of the case."

* * * * *

The fact that the circuit court of appeals decided against appellant's contention does not eliminate the Federal question from the case.

Andrews v. Andrews, 108 U. S. 300.

In this case the court said: "It was suggested at bar that this court was without jurisdiction. But it is unquestionable that rights under the Constitution of the United States were expressly and in due time asserted, and that the effect of the judgment was to deny these rights. Indeed, when the argument is analyzed, we think it is apparent that it but asserts that, as the court below committed no error in deciding the Federal controversy, therefore there is no Federal question for review. But the power to decide whether the Federal issue was rightly disposed of involves the exercise of jurisdiction. As the Federal question was not unsubstantial and frivolous, we pass to a consideration of the merits of the case."

* * * * *

What is implied in a contract has the same force as an express provision.

United States v. Babbitt, 66 U. S. 55.

An implied provision of a contract is as much protected from impairment by Sec. 10 of Art. I of the Constitution of the United States as the express provisions therefor.

Fisk v. Jefferson Police Jury, 116 U. S. 131.

Houston & T. C. R. Co. v. Texas, 177 U. S. 65.

If, then, by a proper construction of the contract contained in Ordinance No. 248, there is an implied obliga-

tion that the city will not become a competitor with appellant, as we contend, it is evident that the ordinances which stand on the same basis as subsequent state legislation impair this obligation. The question of whether or not there is an implied contract necessitates a consideration of the terms and provisions of said ordinance No. 248, and a construction and interpretation thereof. In the brief of the city on this motion (p. 9) it is said: "The whole matter is solved in the interpretation of the franchise contract."

* * * * *

A question once decided by this court is no longer a Federal question. It cannot be said, however, that the decision of the question of the impairment of the obligation of a contract by certain subsequent state legislation is a decision of the question of the impairment of the obligation of another and different contract by other subsequent state laws. That this is true is conclusively shown by the many decisions of this court in the cases in which the question of the impairment of the obligation of a contract arising from a grant by a municipality of a franchise has been considered and decided.

Walla Walla v. Walla Walla Water Co., 172 U. S. 1.
Bienville Water supply Co. v. Mobile, 175 U. S. 109.
Skaneateles Waterworks Co. v. Skaneateles, 184 U. S. 354.
Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 79.
City of Joplin v. Southwest Missouri L. Co., 24 Sup. Ct. Rep. 43.

These cases of themselves should be sufficient answer to the contention that a Federal question is not presented, or, if presented, was decided by the Joplin Case.

The circuit court decided the Federal question thus presented in favor of appellant. This appears from the fact

that the injunction granted was limited to restraining the city from acquiring a plant and supply for, and engaging in the business of furnishing water to the inhabitants. If the circuit court had decided the case upon the claim made by the complainant as a taxpayer, the injunction would also have restrained the city from acquiring the plant and supply for the purpose of furnishing itself with water. Furthermore, the city, appellee in this court and appellant in the circuit court of appeals, assigned as error on its appeal from the decree of the circuit court that the circuit court erred in holding that the said city had contracted away its right to engage in the business of furnishing water to its inhabitants. (See assignment of error No. 3, Record, p. 132). This of itself should be sufficient to establish that the claim of a Federal question is neither fictitious, fraudulent, nor frivolous.

* * * * *

It would seem that the motion to affirm is based upon the theory that the decision of this court in the case of City of Joplin v. Southwest Missouri Light Co., 24 Sup. St. Rep. 43, is decisive of the Federal question presented in the case at bar. This position overlooks the fact that the appeal to this court in the case at bar, unlike an appeal from a state supreme court, confers jurisdiction over the entire case. If the jurisdiction of the circuit court was properly invoked upon the ground of a Federal question as well as because of diversity of citizenship, the decision in the Joplin Case subsequent to the time the jurisdiction of the circuit court attached could not take away the right of appeal to this court or the jurisdiction of this court to decide the entire case. As a matter of fact, the appeal in the case at bar had been perfected many months before the Joplin Case was decided. There are many legal propositions presented in the brief of appellant on the mer-

its to be considered by this court independent of the Federal question, and for this reason the motion must be denied.

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In conclusion, we respectfully submit that an examination of the brief on the merits will disclose that the Federal question relied on is neither fictitious, fraudulent, nor frivolous, but is meritorious, and that the circuit court of appeals erred in deciding the same against appellant.

The motion should be overruled and the case heard upon its merits.

Respectfully submitted,

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